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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 58

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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March 3, 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,[1]

Petitioner,

vs.

ELGIN, JOLIET & EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 4, 1968.

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1. On January 1, 1969, the United Transportation Union, a merger of petitioner, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, and the Order of Railway Conductors and Brakemen, succeeded petitioner as the collective bargaining representative of the employees of the defendant engaged as firemen.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of Indiana, Hammond Division, is not reported but is printed in the Appendix hereto at pp. A 15 to A 22, *infra*.[1] The opinion of the Court of Appeals and dissenting opinion of Judge Otto Kerner is reported at 404 F. 2d 80. It is also reproduced in the Appendix hereto at pp. A 1 to A 14, *infra*.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 4, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Does a federal court, in a state with a full crew law, have jurisdiction under Section 2, Seventh, of the Railway Labor Act to enforce the National Diesel Agreement, requiring the use of a fireman, against a carrier's unilateral change in that agreement, where there has been an adjudication binding upon the parties by a district court and Court of Appeals that the National Diesel Agreement is in effect in full crew states, or is the dispute minor and therefore wholly within the jurisdiction of the National Railroad Adjustment Board?

STATUTE INVOLVED.

The Railway Labor Act, 45 U. S. C. §§ 151 *et seq.*, the relevant portions of which are set forth in the Appendix hereto at pp. A 23 to A 24, *infra*.

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1. References to the Appendix to this Petition are "A". References to the Appendices to Briefs in the Court of Appeals are "App.".

STATEMENT OF FACTS.

1. Preliminary Statement.

The complaint seeks to enjoin conduct of respondent-defendant adjudicated to be impermissible by a binding decision of another Court of Appeals, and to enforce the positive mandates of the Railway Labor Act, 45 U. S. C. §§ 151 *et seq.* (the "Act"). It alleges that the defendant (sometimes referred to as "EJ&E") unilaterally changed the working conditions of the employees represented by the plaintiff-petitioner ("BLF&E") without complying with the duties imposed upon it by § 2, Seventh and § 6 of the Act. The cause was heard on plaintiff's motion for preliminary injunction to require use of firemen until the processes of the Act are exhausted with reference to securing changes in rates of pay, rules or working conditions. The district court concluded that the dispute involved was a minor dispute over which federal courts have no jurisdiction and accordingly dismissed the complaint. The Court of Appeals for the Seventh Circuit affirmed, Judge Otto Kerner dissenting.

There is no dispute of facts. They are summarized below.

2. Controlling Facts.

The National Diesel Agreement of 1950 to which the defendant is a party, and the basic collective agreement of the parties contain work rules which require carriers and the defendant herein to use and employ firemen on substantially all diesel locomotives including the locomotives involved in the operations here in dispute. In addition, Indiana has had for many years a full-crew law requiring the use of firemen which law is still in effect. Burns Ind. Stat. Anno., §§ 55-1330, 55-1331.

In August, 1967, the United States Steel Company com-

pleted a new facility in the Gary Sheet & Tin Plate Works known as the 84-inch hot strip mill. When the mill was completed the defendant EJ&E (a subsidiary of U. S. Steel) commenced a new run on August 12, 1967 known as the 84-inch strip mill job.

It was necessary for the carrier to consider its collective agreements with the three labor organizations representing employees involved in these operations—the Brotherhood of Locomotive Engineers ("BLE"), the Brotherhood of Railroad Trainmen ("BRT"), and plaintiff. Different starting times, different relief points, different provisions for the annulment of assignments, and different manning requirements than those specified in the collective agreements with the organizations were required before the operations could be commenced in the manner contemplated by the defendant.

The agreements with the BLE and BRT were amended by negotiation, the defendant recognizing that it could not make the changes in the manning of this run without such agreements (Def. App. pp. 67-68).

The defendant did not communicate or negotiate with plaintiff concerning changes in its agreement requiring use of a fireman despite repeated requests for negotiation. The defendant operated without a fireman and refused to negotiate on the ground that there was nothing to discuss because the agreement between the parties and the National Diesel Agreement had been modified by the Award of Arbitration Board 282 (Memorandum of the District Court A 15).

3. Related Litigation.

The background of the events leading to the Award of Arbitration Board 282, established under Public Law 88-108 is summarized by this Court in *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U. S.

423, 430-432 (1966), holding that the Award did not supersede state full crew laws.[1]

Award 282 expired on March 30, 1966. Shortly before this date the parties instituted litigation, herein referred to as the *Bangor* case, in the United States District Court for the District of Columbia to determine the consequences of the expiration of the Award. *Bangor & A. R. Co.* v. *Brotherhood of Locomotive Firemen and Enginemen*, 253 F. Supp. 682 (D. D. C. 1966), *affirmed* in part and *reversed* in part, *sub nom., Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co.*, 385 F. 2d 581 (D. C. Cir. 1967), *cert. denied*, 389 U. S. 923 (1968). The issues in the *Bangor* case, insofar as they are relevant and controlling here, related to the impact of the Award in full-crew states. The carriers argued that upon the expiration of the Award and the *subsequent* repeal of a state full crew law, the carriers would then be empowered to place into effect in that state the work rules provided for in Award 282.

This argument was rejected by the district court in the *Bangor* case on May 5, 1966, 253 F. Supp. 682 at 686-7. The Court of Appeals in the *Bangor* case affirmed this hold-

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1. In *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Chicago, Rock Island & Pacific Railroad Co. et al.*, ... U. S. ....., 21 L. Ed. 2d 289 (1968), the Court held the Arkansas full crew law to be constitutional. Attacks on other full crew state laws were instituted in New York, Ohio, Wisconsin and Indiana. *New York Central R. Co.* v. *Lefkowitz*, 259 N. Y. S. 2d 76 (1965), aff'd 282 N. Y. S. 2d 68 (App. Div. 1967), aff'd 23 N. Y. 2d 1, 241 N. E. 2d 730 (1968), appeal dismissed, ... U. S. ....., 33 L. W. 3302 (Feb. 24, 1969); *Akron, Canton & Youngstown R.* v. *Public Utilities Commission of Ohio*, 224 N. E. 2d 169 (1967), affirmed, ... N. E. 2d ..... (Ohio Court of Appeals, November 19, 1968); *Chicago & North Western R. Co.* v. *LaFollette*, 27 Wis. 2d 505, 135 N. W. 2d 269 (1965); *Public Service Commission* v. *New York Central R. Co.*, 216 N. E. 2d 716 (Ind. Sup. Ct., 1966), cert. denied, 385 U. S. 843. The parties in the Indiana suit included both plaintiff and defendant here. The Indiana Supreme Court held the Indiana full crew law to be constitutional and not pre-empted by federal law. On the latter point it relied on this Court's decision in *Locomotive Engineers, supra*, 382 U. S. 423.

ing of the district court and held that the National Diesel Agreement continued in effect after the expiration date of Award 282 in full crew states unless the full crew law was repealed during the period of the award. See the discussion of that court at 385 F. 2d 581, 611, 612, set forth in Judge Kerner's dissent below (A 9-11). This Court denied *certiorari* on January 29, 1968, 389 U. S. 923, and a final judgment consistent with the opinion of the Court of Appeals was entered by the district court on May 29, 1968.[1]

The defendant concedes that the *Bangor* case is *res judicata*.

REASONS FOR GRANTING THE WRIT.

Preliminary Statement.

Five years of bitterly contested litigation in state and federal courts culminating in decisions favorable to plaintiff are wiped out by the decision below.[2] The decision below is patently wrong but cannot be brushed aside simply as an aberrant decision. It sets the pattern for denying justice by abuse of the familiar major-minor dichotomy. In an increasing number of cases, any contention, however unmeritorious, is seized upon as involving an interpretive issue which can only be resolved by the National Railroad Adjustment Board, a tribunal years behind in its docket and a launching pad for a new round of litigation. Unless the pattern is broken more litigation will be spawned. The end result will be a denial of justice.

Certiorari should be granted to break this pattern. It is warranted on the traditional ground of resolving con-

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1. For a description of the carrier's intensive but abortive efforts to overturn the decision on the full crew issue even after denial of *certiorari*, see Appendix to Reply Brief pp. 1-4.

2. See the *Bangor* case, *supra*, and cases cited n. 1, p. 5, *supra*.

flicts between courts of appeals, and to settle an important persistent issue of federal jurisdiction involving interpretation of the Railway Labor Act. It should be granted and the judgment below reversed *per curiam* for the reasons set forth in Judge Kerner's dissent.

1. *The decision below conflicts with a decision of this Court and of the Court of Appeals for the District of Columbia and ignores the res judicata effect of the latter decision.*

The controlling legal issue in this case is whether the award of Arbitration Board 282 modified the National Diesel Agreement in effect between the parties in Indiana, a full-crew state.

Defendant mounts its defense on the assumption that the National Diesel Agreement was so modified, and the rulings below accept this defense.

The crucial fact, ignored by the majority opinion of the court below, is that the issue was thoroughly litigated between the parties in the *Bangor* case, *supra,* and there was a clear and unequivocal ruling by the Court of Appeals for the District of Columbia that "the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law." 385 F. 2d 581 at 611. There was no need or right to inquire into the issue anew. This point is put in its proper perspective by Judge Kerner in his dissenting opinion. After noting that the carrier agrees that the decision in *Bangor* is *res judicata* between the parties, and setting forth the holding in *Bangor,* he states (A 11):

> "As it is conceded that the carrier's attack on Indiana's Full Crew Law * * * failed and the law was not repealed during the life of Award 282, then the 1950 National

> Diesel Agreement was and is in effect between these parties. This is due to the fact that the condition precedent for a change in that Agreement by Award 282, i.e., the repeal of the Full Crew Law, never came to pass."

Moreover, the decision below, by its holding that the carrier may have a basis for claiming that it can operate some runs without a fireman in a full crew state in disregard of the National Diesel Agreement where the full crew law was not repealed during the period of the award, is in direct conflict with the decision of the Court of Appeals for the District of Columbia in *Bangor*.

The ruling below is also in conflict with this Court's decision in *Locomotive Engineers* v. *Chicago, Rock Island & Pacific R. Co.*, 382 U. S. 423 (1966), the rationale for the Court of Appeals decision in *Bangor*.

2. *The decision below presents an important issue of federal jurisdiction arising under the Railway Labor Act which should be resolved by the Court.*

The majority opinion of the court below holds that a federal court is without jurisdiction to enforce the collective agreement of the parties and the positive mandates of the Act. The opinion beats extensively the major-minor drums explicated in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711 (1945).

It winds up favoring the minor dirge and concludes accordingly that exclusive authority to decide the dispute rests in the National Railroad Adjustment Board.

The majority concludes that the dispute is minor because it

> "can be solved by the administrative interpretation of the *existing agreement in light of Award 282*. Although the holding of the District of Columbia Circuit Court

of Appeals in the *Bangor* case may control part of the instant dispute, the agreement must still be applied to the facts presented.[1] * * *

"1. *E.g.*, whether the switching operation in the instant case constitutes a 'run.'" [Emphasis supplied.] (A 5.)

This conclusion misconceives and misrepresents the *Bangor* opinion.

In *Bangor* the court held that Award 282 could not as a matter of law shed any light on the existing agreement since the award did not modify the Diesel Agreement in full crew states. No one disputes the requirement of the Diesel Agreement that there be a fireman on the job in question. The sole dispute is whether that agreement had been modified by Award 282. This question has been answered in the negative in the *Bangor* decision. As Judge Kerner said in dissent (A 8):

> "Neither an application nor an interpretation is required under the facts of this case. There is no dispute as to the facts so there is no reason for an application of any agreement. Since the only alleged dispute between the parties is over a decision of a Court of Appeals (as will be shown below), there is no necessity for interpreting any agreement."

The reference to the new run issue in *Bangor* by the lower court has no relevance in a full crew state such as Indiana.[1] In such a state, the National Diesel Agreement requires the use of a fireman on all runs—old or new. The majority opinion below states that the *Bangor* opinion "may control part of the dispute." By the device of separating the dispute into parts—part 1, the holding on full crew laws, and part 2, the holding on new runs—the

1. In non-full crew states the *Bangor* court held that as to new runs established after expiration of the award to which the provisions of the award could not have been applied during the period it was in effect, the "National Diesel Agreement and its requirement of a fireman on such engine crew" applied. 385 F. 2d at 611.

case is shelved as a minor dispute.[1] But this device, intended to create an issue of fact for an Adjustment Board, is synthetic. There are no parts to this underlying dispute. There is only one issue, and that is whether the National Diesel Agreement was modified by the Award in Indiana. That issue as we show in Part I hereof was adjudicated adversely to the defendant in a decision binding upon it.

The defendant recognized that it could not make the changes necessary to man the run to the 84" steel mill without negotiating changes in its agreements with the BLE and BRT (Def. App. 67-68). The only explanation offered as to why no agreement was made with the BLF&E was the carrier's opinion that the National Diesel Agreement was modified in Indiana by the Award (Def. App. 68). Judge Kerner was charitable in characterizing this opinion (A 13) as one not made "in good faith." His conclusion that "the carrier unilaterally changed the existing working conditions contained in the National Diesel Agreement in violation of the Railway Labor Act" is fully supported by the record.

The only relief sought by the complaint is for an injunction requiring the assignment of a fireman until the defendant has exhausted the processes of the Act with respect to changing rates of pay, rules or working conditions. Jurisdiction to grant such relief is firmly part of Railway Labor law.[2]

---

1. This holding by the lower court may be explained in part by its confusion as to the nature of the case before it. Its statement at A 5 "The nature of this controversy is such that the policy behind our entire system of railway labor law precludes the possibility of the use of a strike—with its consequent interference with interstate commerce—to settle the dispute" indicates that the court regarded the matter before it as a strike situation instead of an application by the union for an injunction to enforce the mandates of the Act.

2. *Virginian Railway Co.* v. *System Federation No. 30,* 300 U. S. 515, 549-553 (1937); *Texas & New Orleans R. Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 567-571 (1930);

In a recent case involving precisely the same issue as this case injunctive relief to enforce Section 2, Seventh of the Act was granted. *BLF&E* v. *Detroit, Toledo Shore Line Railroad Company,* 70 L. R. R. M. 2237 (N. D. Ohio, Dec. 13, 1968).

The majority opinion below should be repudiated by the Court for another reason of overriding importance. It is part of a growing pattern of judicial opinion designed to nullify or frustrate legitimate rights of labor unions by unwarranted use of the major-minor dichotomy. In strike situations the objective is to circumvent the limitations of the Norris-LaGuardia Act. In this case the plaintiff did not strike, although there was a right to do so.[1] Instead it sought judicial relief to which it was clearly entitled. How can the result in this case be explained to workingmen? It will not advance their respect for the courts to explain that the writer of the majority opinion in the course of oral argument referred to the case as a "featherbedding case."[2]

Manning v. *American Airlines Inc.,* 329 F. 2d 32 (C. A. 2, 1964) *cert. denied,* 379 U. S. 817; *United Industrial Workers & Seafarers, etc.* v. *Board of Trustees,* 351 F. 2d 183 (C. A. 5, 1965); *Railroad Yardmasters of America* v. *Pennsylvania Railroad,* 224 F. 2d 226 (C. A. 3, 1955); *Brotherhood of Locomotive Firemen and Enginemen* v. *Southern Railway Company,* 212 F. Supp. 465, 217 F. Supp. 58 (D. D. C., 1963), *affirmed* 337 F. 2d 127 (C. A. D. C., 1964).

1. *Brotherhood of Ry. & S. S. Clerks* v. *Florida East Coast Ry. Co.,* 384 U. S. 238 (1966), citing with approval *Florida East Coast Ry. Co.* v. *Brotherhood of R. R. Trainmen,* 336 F. 2d 172, 179-180 (5th Cir. 1964); *Butte, Anaconda & P. Ry.* v. *BLF&E,* 268 F. 2d 54 (C. A. 9, 1959), *cert. denied* 361 U. S. 864.

2. In *BLF&E* v. *Chicago, Rock Island & Pac. R. Co.,* ..... U. S. ....., 21 L. Ed. 2d 289, 296, this Court, in upholding the validity of the Arkansas full crew law, referred to the first finding of Arbitration Board 282:

> "1. The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work."

The time has come for this Court to discourage judges from following the philosophy of the Queen in *Alice in Wonderland*.[1]

> "The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."
>
> "It *must* come sometimes to 'jam today,' Alice objected."
>
> "No, it can't" said the Queen. "It's jam every *other day*: to-day isn't any *other* day, you know."

Carroll, *The Annotated Alice*, p. 247.

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1. In view of the large number of lower court decisions subsequent to *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R.*, 353 U. S. 30 (1957), many of which appear irreconcilable and are cited in the authorities referred to below, relating to major versus minor disputes in the context of the right to injunctive relief (by the carriers to enjoin strikes and, as here, by the unions to compel compliance with the Act), this Court should grant *certiorari* to review a concept so vital to the administration of the Act. We observe also that in *Rutland Ry. Corp.* v. *B. L. E.*, 307 F. 2d 21, 42 (2nd Cir. 1962), Mr. Justice (then Circuit Judge) Marshall stated in dissent that the major-minor dichotomy "is of such generality that it fails to pose the problems we must solve in any meaningful fashion." A leading labor law scholar, Benjamin Aaron, has stated that "the changing character of disputes arising under the Act has tended to destroy whatever useful distinctions were originally implied by the words 'major' and 'minor'" and the classification of such disputes in these terms has become "a sterile exercise in logomachy." Aaron, *The Labor Injunction Reappraised*, 14 Labor L. J. 41, 62, 63 (1963). The distinction is "illusive" and requires "clarity" by this Court. *Id.* at 58. Other commentators have also suggested the need for new guidelines by this Court. See, *e.g.*, Note, *Railway Labor Act—Major and Minor Disputes*, 31 J. of Air Law & C. 371, 376 (1965); Comment, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 Tenn. L. Rev. 264, 274 (1965). The "major-minor" dichotomy has resulted in "incredible judicial contortions," "an incredible muddle," "casuistry" and "fumbling misclassifications of 'major disputes' into 'minor disputes' * * *" Kroner, *Interim Injunctive Relief Under the Railway Labor Act: Some Problems and Suggestions*, 18th Annual Conference on Labor, New York University (1966) 179, 183, 184, 188, 189.

CONCLUSION.

For the reasons herein set forth, and the plainly erroneous character of the holding below, this Court should issue a writ of certiorari to the Court of Appeals for the Seventh Circuit and reverse the judgment of that court *per curiam*.

Respectfully submitted,

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